

Before the
Federal Communications Commission
Washington DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

National Association of Broadcasters'
Petition for Declaratory Ruling
Regarding Programming in the
Satellite Digital Audio Radio Service

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Docket No. MB 04-160

To: Commission

REPLY COMMENTS OF CUMULUS MEDIA INC.

Cumulus Media Inc. ("Cumulus"), acting pursuant to the Commission's Public Notice of April 27, 2004, *Requests for Comment on the Petition Filed by the National Association of Broadcasters*, 19 FCC Rcd 7203 (2004), hereby replies to the Opposition (the "Opposition") of Sirius Satellite Radio Inc. ("Sirius Radio") and XM Radio Inc. ("XM") to the Petition for Declaratory Ruling (the "Petition") filed by the National Association of Broadcasters ("NAB") in the above-referenced docket.

Introduction

The NAB Petition is designed to eliminate the current controversy over whether the services of Sirius Satellite and XM in the Satellite Digital Audio Radio Service ("SDARS") can include local weather and traffic reports (and other local programming as well). To that end, the Petition requested that the Commission prohibit Sirius and XM from (1) using any technology to permit the delivery of programming in one location that would differ from the programming distributed in another location and (2) providing weather, traffic and other local programming on nationally distributed channels.

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In their Opposition, Sirius and XM do not challenge the NAB's position that SDARS licensees are precluded from making different programming available to different locations. However, the Opposition maintains that distribution of weather, traffic, and other local programming on national channels is consistent with the authorizations received by Sirius and XM from the Commission.

Cumulus is well positioned to comment on that controversy. Cumulus is a publicly-traded company which owns and operates more than 250 radio stations in more than 50 mid-size markets throughout the country. Cumulus therefore has both the experience and the interest to respond to the Opposition's legal arguments and to address the impact on terrestrial radio stations if the Opposition's arguments are sustained by the Commission.

I. Controversy Exists.

The Opposition claims that the NAB Petition can and should be dismissed or denied because there is no "controversy" or "uncertainty" that warrants the issuance of a declaratory ruling. Opposition at 4 - 6. In support of that contention, the Opposition states that there is no issue with respect to SDARS licensees providing different programming to different locations because both Sirius and XM provide the same programming to every location. Opposition at 4 - 5. The Opposition adds that there is no controversy or uncertainty with respect to the provision of local traffic or weather by SDARS licensees because such programs "are a crucial and long accepted component of radio services." Opposition at 5.

To be sure, no controversy or uncertainty exists if Sirius and XM agree that SDARS licensees cannot offer different programming to different locales. Although the Opposition acknowledges that all local programming by Sirius and XM is currently distributed on national channels, the Opposition does not explicitly concede that SDARS licensees are precluded from

distributing different programming to different locales on their satellite channels at any point in the future. Contrary to the Opposition, issuance of a declaratory ruling on that latter point would eliminate any uncertainty as to whether SDARS licensees can offer different programming to different locales over their satellite channels if and when technology should permit such usage.

The NAB Petition's second request cannot be disposed of as easily as the Opposition claims. As the Opposition acknowledges, terrestrial radio licensees have included traffic and weather reports in their local programming for decades. However, that obvious fact says nothing whatsoever about the right of SDARS licensees to provide those kinds of radio services. Quite the contrary. As the Petition makes clear, SDARS was authorized on the presumption that it would *not* include those kinds of local services and thereby compete with terrestrial radio. *See e.g.*, Petition at 4 (“traditional radio is a *local service* attracting local advertising while Satellite Radio is an *inherently national service*”). The long record in the evolution and licensing of SDARS confirms that perspective. In literally thousands of pages of documents and pleadings filed and released over the course of more than ten years, there is apparently not one word about SDARS licensees providing local weather and traffic reports. There is thus some uncertainty concerning the rights of SDARS licensees to provide local traffic and weather reports (and other local programming) on nationally-distributed satellite channels, and the NAB's Petition, in and of itself, demonstrates that there is an existing controversy which warrants clarification by the Commission.

II. No Local Programming Should Be Permitted on SDARS Channels.

Although it implicitly concedes that the voluminous record on SDARS does not contain any discussion of local traffic and weather reports, the Opposition contends that such

programming can be classified as permissible “*ancillary* uses of the satellite DSAR band.”

Opposition at 5 (emphasis in original; footnote omitted). That argument is misguided.

The Commission did of course agree that SDARS licensees should have some “flexibility” to offer “ancillary services.” *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754, 5792-93 (1997) (subsequent history omitted). However, the Commission did not envision that SDARS licensees would offer traffic, weather or other local public service programming provided by terrestrial radio broadcasters; rather, the Commission envisioned ancillary services to be information and data services such as “high speed broadcast data, location based geographic information, electronic graphic/visual information, voicemail and alpha-numeric messages.” 12 FCC Rcd at 5792 n.167 (1997). The Commission’s perspective on “ancillary services” reflected the Commission’s view that SDARS licensees would provide services that terrestrial radio broadcasters could not provide, including (1) service to “communities where terrestrial broadcast service is less abundant,” (2) “new services that local radio inherently cannot provide,” and (3) “niche programming [for] . . . small, nationally dispersed listener groups that local radio could not profitably serve.” 12 FCC Rcd at 5760-61 (footnote omitted).

In this context, it matters not that local weather and traffic reports serve the public interest. See Opposition at 6 - 8. Local terrestrial radio broadcasters already provide that informational service in abundance. This is especially so since the markets which XM and Sirius have initially targeted for their local weather and traffic reports – twenty-one (21) major metropolitan markets (including New York, Chicago, Los Angeles and Dallas-Ft. Worth) – already host an abundance of terrestrial radio services providing local traffic and weather reports.

Consequently, XM and Sirius are doing nothing more than duplicating a service that is already provided.

Contrary to the Opposition's claim, the NAB's opposition to the provision of weather and traffic reports (as well as other local programming) by SDARS licensees does not fall within the ambit of the now-repealed *Carroll* doctrine. See Opposition at 8, citing *Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440 (D.C. Cir. 1958). The *Carroll* doctrine centered on efforts by terrestrial broadcasters to prevent or delay the entry of other new terrestrial stations who would compete on the same footing. The Commission ultimately repealed the *Carroll* doctrine because "the underlying premise of the *Carroll* doctrine, the theory of ruinous competition, *i.e.*, that increased competition in *broadcasting* can be destructive to the public interest, is not valid in the *broadcast* field." *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638, 640 (emphasis added). Stated another way, the *Carroll* doctrine related to terrestrial broadcast stations who were competing on a level playing field – not competition between two different services (SDARS and terrestrial radio broadcasting) that are subject to different regulatory requirements.

It may be, as the Opposition contends, that terrestrial radio broadcasting has had some financial successes since 1992 when the Commission first introduced duopolies. But that is a far cry from saying, as the Opposition also implies, that every radio broadcaster is awash with unprecedented profits. Opposition at 11 – 12. Radio remains a very competitive business where the cost of providing weather, traffic, news and other local services is considerable. The Commission cannot expect free over-the-air terrestrial radio broadcasters to continue to provide that local service if they are subjected to competition from national satellite carriers who do not

have the same regulatory burdens and who were never expected to be competitors of terrestrial radio broadcasters in the provision of local programming services like weather and traffic.

III. No Hearing Required to Impose Restrictions

The Opposition claims that any restriction on programming to be offered by Sirius and XM would constitute an unconstitutional abridgement of their first amendment rights and require a hearing under Section 316 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §316, to "modify" their respective licenses. Opposition at 13 – 16. These arguments have no merit.

The Commission plainly has the authority to adopt a general policy which imposes restrictions on the programming of its licensees without conducting a hearing under Section 316 of the Act.¹ *E.g. WBEN, Inc. v. FCC*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968) (Section 316 hearing only required "when the agency bases its decision on the peculiar situation of individual parties who know more about this [issue] than anyone else" but not when "a new policy is based on the general characteristics of an industry"). *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 - 93 (1969) (broadcast licensees can be required to provide programming to serve the public interest that they might not otherwise provide in the exercise of their individual discretion). The Commission's authority stems from many sources within the Act, including, *inter alia*, Section 303(r), which authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ." 47 U.S.C. §303(r).

¹ It is ironic that the Opposition should cite *Red Lion* for the proposition that any restriction on SDARS licensees would constitute an abridgement of a licensee's first amendment rights. That was the very argument advanced – and rejected – in *Red Lion*. *See* Opposition at 14.

There is ample justification for a general policy that restricts the programming of SDARS licensees. From the beginning, the Commission has been concerned with the prospect of unfair competition to local terrestrial radio broadcasters and, to that end, precluded SDARS licensees from offering different programming to different locales. The NAB Petition asked for nothing more than enforcement of that general principle to ensure that SDARS licensees do not indirectly provide local programming services which evade those restrictions. A grant of the Petition will no more constitute a modification of Sirius and XM's licenses than would any other regulatory restriction imposed on a class of services (as opposed to an individual licensee). Given that truism, it is not surprising that the Opposition fails to cite any authority to support its argument that a Section 316 hearing would be required in conjunction with any grant of the NAB Petition.


Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the NAB Petition be granted.

Respectfully Submitted,

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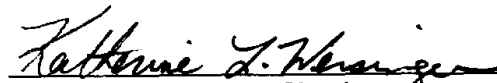
CERTIFICATE OF SERVICE

I, Katherine Wersinger, a legal secretary at Dickstein Shapiro Morin & Oshinsky, do hereby certify that on this 21st day of June, 2004, I caused copies of the foregoing "Reply Comments of Cumulus Media Inc." to be sent by first-class mail, postage prepaid, to the following:

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